

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

FEB 14 2008

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0273-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
EUGENE WALTER TUCKER,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-13788

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Eugene Walter Tucker

Yuma
In Propria Persona

V Á S Q U E Z, Judge.

¶1 Following a jury trial in 1985, petitioner Eugene Tucker was convicted of first-degree murder and sentenced to life imprisonment without the possibility of parole for twenty-five years. The Supreme Court of Arizona affirmed his conviction and sentence in

State v. Tucker, 157 Ariz. 433, 759 P.2d 579 (1988). Tucker subsequently filed at least ten petitions for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and this court denied relief on five of Tucker's petitions for review of the denial of post-conviction relief.¹ This *pro se* petition for review follows the trial court's dismissal of what appears to be Tucker's eleventh petition for post-conviction relief and the denial of his motion for rehearing. We will not disturb the trial court's ruling unless an abuse of discretion affirmatively appears. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 In April 2007, Tucker filed a "Motion for Additional Presentence Incarceration Credits in Accordance with Arizona Revised Statutes, Section 13-709(B)," a pleading the trial court treated as a petition for post-conviction relief. On review, Tucker argues the trial court should not have treated his motion as a Rule 32 petition and, in any event, the court improperly denied his request for 174 days of presentence incarceration credit. Following his August 8, 1984, arrest for murder, Tucker was held in custody pursuant to that arrest and for having violated the terms of his parole in two other matters. He was released on January 29, 1985, when he was permitted to post bond after the trial court dismissed the state's allegation of committing a dangerous nature felony while on

¹*State v. Tucker*, No. 2 CA-CR 2005-0321-PR (memorandum decision filed May 23, 2006); No. 2 CA-CR 2003-0115-PR (decision order filed July 23, 2004); No. 2 CA-CR 01-0063-PR (memorandum decision filed July 12, 2001); No. 2 CA-CR 99-0040-PR (memorandum decision filed July 27, 1999); No. 2 CA-CR 93-0405-PR (memorandum decision filed Oct. 19, 1993).

parole, having found that Tucker's parole had expired before he committed the instant offense.

¶3 In its ruling dismissing Tucker's petition, the trial court correctly noted it was treating Tucker's motion as a Rule 32 petition for post-conviction relief "because no other avenue exists for the petitioner to bring such a motion; and . . . because this court wishes to create a record for appellate purposes." Because the trial court correctly reasoned that Tucker's only avenue of relief was through Rule 32, we reject his assertion on review that the trial court "took unfair advantage" of him by treating his claim under Rule 32 solely in order to find it precluded. Moreover, although we agree with the trial court that, having filed "at least" ten previous Rule 32 petitions, Tucker's motion was arguably precluded, the court nonetheless addressed his claim on the merits, a ruling we summarize briefly below.

¶4 Tucker contends that, because his parole hold was illegal, and because he could have posted bond and secured release at the time of his arrest, he is now entitled to credit for the 174 days he spent in custody as a result of that error. The trial court provided a detailed chronology setting forth the dates Tucker spent in custody before he was sentenced. Notably, the court pointed out that Tucker "was given credit for 200 days of presentence incarceration; 175 days for the time spent in custody from August 08, 1984 [arrest] through January 29, 1985 [release on bond]; plus 25 days for the period between August 19, 1985 [guilty verdict] and September 12, 1985 [sentencing]." The court further noted that, in light of the fact that Tucker had been given credit for the time he had spent in

custody, he was essentially requesting double credit for that time, a claim the court properly rejected. The court added:

The fact that the parole hold was “illegal” does not entitle the petitioner to credit for time spent in custody on the parole violation because he was also held in custody in the present offense.

. . . .

As to the petitioner’s **second** argument, that he could have posted bond earlier but for the DOC hold, the court does not dispute that the DOC hold may have prevented the petitioner from being released had he posted bond in the present case. Had he done so, however, he would not have received presentence incarceration credit while released on bond because he would not have been in custody. The court can only give credit for time actually spent in confinement.

¶5 Because Tucker received the credit to which he was entitled under A.R.S. § 13-709(B), the trial court properly dismissed his petition. Accordingly, although we grant the petition for review, we deny relief.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge